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IN THE

Supreme Court of the United States

October Term, 1970
No. 1527

ELDON INDUSTRIES, INC., ROBERT SILVERSTEIN; DENNIS TIBERIIS; DONALD TAYLOR and TERRENCE CREIGHTON,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent,

SUPREME COURT OF THE STATE OF CALIFORNIA,

Respondent,

GARTH A. CLOWES,

Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI.

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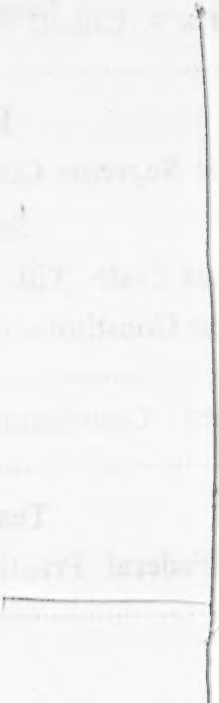

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ELDON INDUSTRIES, INC., ROBERT SILVERSTEIN; DENNIS TIBERIIS; DONALD TAYLOR and TERRENCE CREIGHTON,

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SUPREME COURT OF THE STATE OF CALIFORNIA,

Respondent,

GARTH A. CLOWES,

Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI.

This Petition for Writ of Certiorari arises out of a ruling by the Respondent Superior Court of the County of Los Angeles for the State of California (hereinafter referred to as "SUPERIOR COURT") ordering Petitioners to produce several thousand documents which Petitioners contend raises a substantial Constitutional question relative to their rights to be free from unreasonable searches and seizures under the Fourteenth and Fourth Amendments of the United States Constitution. Petitioners also assert that they have been denied procedural due process of law by the Respondent, Supreme Court of the State of California (hereinafter referred to as "SUPREME COURT") when it denied Petitioners the right to a hearing on the Constitutional question of unreasonable search and seizure.

I.
Factual Summary.

This action arises out of the Complaint filed by Petitioner, Eldon Industries, Inc., against the real party in interest Garth A. Clowes (hereinafter referred to as "CLOWES") in the Supreme Court, for breach of trust and confidence and the wrongful appropriation and use of Petitioner Eldon's trade secrets.

Petitioner Eldon is a major developer, manufacturer and distributor of toy products in the United States and throughout the world. The success of Eldon's business depends on its ability to develop new and unique toys. To some extent ideas for new marketable toys and toy concepts are developed and generated within its toy division. Other substantial contributions come from toy suppliers, including toy suppliers located in Japan and elsewhere. Ordinarily Petitioner and its Asian suppliers work in a close and confidential relationship. The ideas, concepts, developments, manufacturing and marketing procedures generated to and from Eldon are maintained secret and are the valuable trade secrets of Eldon.

Clowes was a valuable employee of Petitioner Eldon's and as general manager of Petitioner's toy division, Clowes was responsible for the development, procurement, manufacture, exploitation and distribution of Eldon's toy products. In discharge of his employment duties Clowes worked closely with Eldon's Japanese suppliers, particularly Tomy Kogyo Company, Inc., and was entrusted with confidential and secret information relating to new and unique toy ideas developed between Petitioner and Tomy Kogyo Company, Inc. Clowes was also Vice President of Eldon and a member of Eldon's Board of Directors.

On March 31, 1969, Clowes terminated employment with Eldon and since this date Clowes has directly competed with Eldon, utilizing all the information, facts, ideas, concepts and secrets of Eldon that were learned by Clowes while in a position of trust and confidence with Eldon and as its general manager.

On April 15, 1970, Clowes served a voluminous Motion to Compel Production of Documents on Petitioners, requesting the production of thousands of generally described documents. On May 25, 1970, Petitioners filed their opposing papers alleging that Clowes' motion and the documents requested therein lacked the requisite "specificity" for production and a reasonable search and seizure, that Clowes' supporting affidavits did not illustrate and show "good cause" for the search and production and that many of the requested documents would divulge and disclose to Clowes, a direct business competitor, the trade secrets of Petitioner. (A copy of this notice will be separately lodged pursuant to Rule 23-1(i)).

On October 26, 1970, the Superior Court judicially approved the search and seizure by Clowes and had ordered Petitioner to produce substantially all documents requested in Clowes' original motion and affidavit. (Attached hereto and marked Exhibit A). On November 13, 1970, Petitioners filed a Petition for Writ of Prohibition in the Court of Appeals, Second Appellate District for the State of California, requesting an alternative and peremptory writ to restrain the Superior Court from executing its order of October 26, 1970. The Petition for Writ of Prohibition was summarily denied without a hearing by the Court of Appeals on December 3, 1970. (Attached hereto and Marked Exhibit B). On December 14, 1970, Eldon filed a Peti-

tion for Hearing in the Supreme Court, the highest Court of the State, which was denied on December 30, 1970. (Attached hereto and marked Exhibit C). Petitioners requested a hearing before the Supreme Court on grounds that the Superior Court's order judicially approved an unreasonable search and seizure of Petitioners' private papers which is prohibited under the California and the United States Constitutions. (Copies of all the foregoing documents were filed with Petitioners' Application for Stay of Execution).

II.

Jurisdiction.

The jurisdiction of the Supreme Court of the United States to review this case on Petition for Writ of Certiorari rests on 28 U.S.C., Section 1257(3). Pursuant to 28 U.S.C., Section 1257(3) substantial Federal and Constitutional questions were raised in the State Courts below and should be subject to review and decision by this Court.

III.

The Question Before This Court Is Ripe for Decision.

Certiorari should be granted in this case because it involves important questions on Constitutional law that have remained unclarified and are therefore "ripe" for decision.

"The basic purpose of the Fourth Amendment as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court,* 387 U.S. 523, 87 S. Ct. 1727, 1730 (1967).

Notwithstanding these well established safeguards, the Superior Court has taken affirmative action in compelling Petitioners to suffer unreasonable and extraordinary expense, burden, oppression and annoyance in searching Petitioner Eldon's private files for *generally* described documents *without* any showing of good or probable cause.

IV.

Judicial Enforcement of an Unreasonable Private Search and Seizure by the State Courts of California Constitutes "State Action" Under the Due Process Clause of the Fourteenth Amendment.

The act of the Superior Court in issuing the Order to Produce thousands of generally described documents, in the absence of particularity describing the "things" to be seized and a sufficient showing of good or probable cause by Clowes constitutes "state action" under the Fourteenth Amendment of the Constitution of the United States.

> "That the action of the state courts and of judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this court." *Shelley v. Kraemer,* 334 U.S. 1, 68 S. Ct. 836, 842 (1948).

The Fourth Amendment thus gives concrete expression to a right of the people which is basic to a free society. "As such, the Fourth Amendment is enforceable against the States through the Fourteenth Amendment." *Camara v. Municipal Court, supra,* at 87 S. Ct. 1730.

V.

The Action by the Superior Court Violated Petitioners' Rights Against Unreasonable Searches and Seizures Guaranteed Under the Fourteenth and Fourth Amendments.

The Fourth Amendment provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing the place to be searched and the persons or things to be seized.*" (Emphasis added)

The Fourth Amendment is applicable to prevent the State action through application of the Fourteenth.

> "Since the Fourth Amendment's right of privacy has been declared enforceable against the states through the Due Process clause of the Fourteenth Amendment it is enforceable against them by the same sanctions of exclusion as is used against the Federal Government." *Mapp v. Ohio,* 367 U.S. 643, 81 S. Ct. 1684, 1691 (1961).

This Court first recognized that the Fourth Amendment through the Fourteenth Amendment protects citizens from unreasonable searches and seizures in both criminal and civil matters in the case of *Camara v. Municipal Court,* 387 U.S. 294, 87 S. Ct. 1727 (1967). Mr. Justice White stated at 87 S. Ct. 1732:

> "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment (through the Fourteenth Amendment) only when the individual is suspected of criminal behavior."

In *United States v. Undetermined Quantities of D. and S. Drugs,* 282 F. Supp. 543 (1968), the District Court for the Southern District of Florida discussed this Court's decision in *Camara* and concluded:

> "In the light of these recent decisions abolishing technical distinctions this Court cannot accept a distinction between a civil seizure and a criminal seizure . . . privacy is disturbed as much by a civil seizure like the one in the instant case as it is by a criminal seizure." *United States v. Undetermined Quantities of D. and S. Drugs,* 282 F. Supp. at 546.

In *See v. City of Seattle,* 387 U.S. 541, 87 S. Ct. 1737 (1967) this Court ruled that businessmen have a Constitutional right to be free from unreasonable searches and seizures by State officials and that subpoenas requiring production of corporate books and records must be "sufficiently limited in scope, relevant in purpose and specific in directive so that compliance will not be unreasonably burdensome." 383 U.S. 543-544, 87 S. Ct. 1739-1740.

A. The Records to Be Produced Under Respondent Superior Court's Order Are Not Specified With Reasonable Particularity so as to Satisfy the Fourth Amendment Requirements.

The Superior Court's Order requires Petitioners to produce a voluminous number of documents generally described and with descriptions so broad as to virtually qualify every written document in Petitioner Eldon's files. As example, Paragraph III of Clowes' Petition demands production of the following:

1. For the period January 1, 1962, through and including March 31, 1969:

   A. Such correspondence and agreements as related to the above subject matter shall include, but not be limited to the following:

(1) All correspondence and agreements wherein the word "confidential" and/or "proprietary" or words of similar import and effect are affixed thereto or stamped thereon, including but not limited to all correspondence in the possession of Eldon received from any source whatsoever, including its employees, officers, agents and/or directors, wherein such words as are described above are affixed or stamped thereon.

(2) All purchase orders issued by Eldon to its sources of supply and/or vendors for the purchase of products, product components, services, raw materials, machinery, molds, tools, dies and/or services.

(3) All correspondence between Eldon, on the one hand, and its sources of supply, on the other hand.

(4) All agreements between Eldon, on the one hand, and its sources of supply, and vendors, on the other hand.

(5) All correspondence between any employees, officers, directors, and agents of Eldon.

In Paragraph III of Clowes' Motion there are no less than forty (40) such generally described demands for production of documents. Further Paragraph III is only one of nineteen (19) such paragraphs demanding the production of similarly described documents. The Court can clearly see that the search for such documentation would require a complete and comprehen-

sive search of all documents of any nature in Petitioners' business from the period 1962 through 1970. Therefore the Court Order authorizing such an expedition through all the records and papers of Petitioner Eldon is an unreasonable search and seizure under the Fourth Amendment.

Schultz v. Yeagar, 293 F. Supp. 794 (1967), summarized the Constitutional guarantees of the Fourth Amendment relating to the production of documents and records:

> "A subpoena duces tecum, or an order authorized by law, calling for the production of records, may be so broad and sweeping as to constitute an unreasonable search and seizure under the Fourth Amendment. *Boyd vs. United States,* 116 U.S. 616, 6 S. Ct. 524 (1886); (other Citations omitted) . . .
>
> "Corporate records, like personal papers, may also enjoy the Fourth Amendment's constitutional protection from unreasonable searches and seizures . . . (citing *See vs. United States*) . . . Once standing to object is established, the Court must then apply federal standards to determine whether or not there has been an unreasonable search and seizure by State officials. (Citation omitted). The resolution of this question depends upon a number of factors. *The Court must determine whether the records to be produced are relevant to the investigation being pursued, whether such records are specified with reasonable particularity, and whether the records cover a reasonable period of time. . . .*" 293 F. Supp. 799, 800.

The foregoing cases unquestionably establish a Constitutional right in Petitioners to be free from unreasonable searches and seizures of corporate books and records authorized by State action through the Superior Court Order of October 26, 1970. A complete review of Clowes' Motion to Compel Production on which the Superior Court Order is based shows that there is a lack of specificity, good cause and reasonableness of time period. The Motion is broad and sweeping, and compliance with the State's Order would therefore by necessity require an unreasonable search and seizure violating the Fourth Amendment which is applicable to the States through incorporation into the Fourteenth Amendment.

B. The Superior Court's Order Directs a Search and Seizure Without Any Showing of Good or Probable Cause.

Insofar as this Court in the *Camara* case, *supra,* has established the right of privacy as to both criminal and civil searches and seizures, the same safeguards must be applied for each. "In cases in which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness." *Camara, supra,* 87 S. Ct. at 1734.

Clowes' Motion fails in any way to show good or probable cause for the requested search, and as such constitutes the very type of unreasonable search and seizure intended under the Fourth Amendment to be protected against.

C. The Superior Court Order Would Cause Eldon to Suffer Undue Oppression, Burden and Abuse in Gathering and Production of the Thousands of Documents Requested.

Respondent Clowes has failed to indicate either good cause for or relevance of the data demanded. However, clearly Petitioner Eldon would suffer not only an unreasonable burden, oppression and expense in providing these documents but would also risk the loss of its own valuable trade secrets. In the case of *Greyhound Corp. v. Superior Court, Merced County,* 364 P. 2d 266, 15 Cal. Rptr. 90 (1960), Justice Peters stated at Page 111 of 15 Cal. Rptr. as follows:

> "The present statutes, however, provide that an order requiring a party to submit to inspection of material in his possession or control may only be made for good cause, shown on motion heard after notice to such party. It is further provided that in making such order the court shall exercise a wide discretion in the application of any number of procedures intended to protect the parties against abuse, oppression or any alleged injustice thus, the statute has adequately provided for protection against the unreasonableness of search and seizure."

Petitioner Eldon submits that it is within the discretion of the Court to prohibit such unreasonable search and seizure by Respondent Clowes of Petitioner Eldon's complete file of books, records and correspondence, including trade secrets and that the State Courts exceeded their jurisdiction in affirming the Orders to Produce.

VI.

The Court in Ordering the Production of Documents Including Trade Secrets of Eldon for the Benefit of Respondent Clowes Has Exceeded Its Jurisdiction.

Defendant Clowes is presently engaged in the manufacture, and distribution of toys, and is at present the President of a corporation that is in direct competition with Petitioner Eldon.

The Court has issued an Order requiring Eldon to produce several thousand documents many of which contain the trade secrets of Petitioner Eldon. Release of said trade secrets to a direct competitor will cause for Petitioner Eldon not only a great hardship but also will release to a competitor the basic trade secrets of the industry. The rule is stated in Volume 4 of Moore's Federal Practice, 2nd Edition, pages 2519 through 2520:

> "There is no true privilege against discovery of trade secrets or other 'confidential' business information, but the court nevertheless will exercise its discretion to avoid unnecessary disclosure of such information, particularly where the action is between competitors."

In a decision by the United States Court of Appeals of the 5th Circuit, affirming the lower Court's ruling which limited discovery when the release of trade secrets would give the recipient of the secret information a competitive advantage, District Judge Fisher stated:

> "Moreover, we think it obvious that the discretion of the District Court was in fact exercised wisely given the likely effects which misuse of the detailed and sensitive information could have." *United States v. United Fruit Company*, 410 F. 2d 553 (1969).

VII.

In Summarily Denying Eldon's Petition for Hearing, the Supreme Court of the State of California Has Violated Petitioners' Rights to Procedural Due Process.

> ". . . the 'right to * * * a hearing is one of 'the rudiments of fair play' * * * assured * * * by the Fourteenth Amendment * * *. [t]here can be no compromise on the footing of convenience or expediency * * * when that minimal requirement has been neglected or ignored." (Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 304-305, 57 C. Ct. 724, 730, 81 L. Ed. 1093 (1937)).

The Supreme Court has summarily denied the hearing on the merits of the matter and this denial constitutes a violation of Eldon's rights of procedural due process under the Fourteenth and Fourth Amendments of the Constitution.

Wherefore, the Petitioner prays that the within Petition for Certiorari be granted.

Respectfully submitted,

LAW OFFICES OF MAX FINK,
MAX FINK,
JOHN T. WALLER,
R. STEPHEN DUKE,
MAURICE MEYERS,
Attorneys for Petitioners.

EXHIBIT A.

Eldon Industries, Inc. vs. Garth A. Clowes, et al., 960660.

Counsel for Plaintiff Max Fink, by John Waller.

Counsel for Defendant Rouse & Hamilton, by Paul Hamilton.

NATURE OF PROCEEDINGS:

Motion of defendant and cross-complainant Garth A. Clowes for Order to compel production of documents.

In this matter, heretofore submitted, the Court now renders his decision and order as follows:

As limited by counsel for moving party, and described in the Reporter's Transcript of September 30, 1970, motion is granted.

Above counsel notified by mail this date.

Oct. 26, 1970.

EXHIBIT B.

Los Angeles, Cal., Dec. 3, 1970.

TITLE:

Eldon Industries, Inc., et al. vs. Superior Court L.A. Co., No. 37479.

THE COURT: Petition for writ of prohibition denied.

Clay Robbins, *Clerk*

EXHIBIT C.

CLERK'S OFFICE SUPREME COURT
4250 State Building
San Francisco, California 94102

Dec. 30, 1970.

Dear Sir: *I have this day filed Order* HEARING DENIED.

In re: 2 Civ. No. 37479.

Eldon Industries vs. Superior Court, L.A. Co.

Respectfully,

Clerk